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**IND104060.E**

India: Treatment of sexual minorities, including legislation, state protection, and support services (April 2009-March 2012)

Research Directorate, Immigration and Refugee Board of Canada, Ottawa

### 1. Situation of Sexual Minorities

In a telephone interview with the Research Directorate, an associate professor at York University, who is also a faculty associate at York's Centre for Feminist Research and the principal investigator for an international research project on the impact of criminalizing sexual orientation and gender identity (York University 31 Mar. 2011), indicated that sexual minorities in India face "a lot of homophobia and transphobia" (Associate Professor 16 Apr. 2012). The English version of the Arabic news network Al Jazeera notes that "being gay remains deeply taboo in most of the country, and many homosexuals hide their sexual orientation from friends and families" (5 July 2011). In correspondence with the Research Directorate, Sangini (India) Trust (Sangini), an organization that works primarily with "women attracted to women and individuals dealing with issues around their gender orientation," similarly noted that, based on its work experience, lesbian, bisexual and transgender (LBT) individuals face homophobia, discrimination and violence because of their sexual orientation (14 Apr. 2012).

As example, the organization said that LBT persons can lose their jobs, experience domestic violence, be forced into marriage, or be "lock[ed] up at home" (Sangini 14 Apr. 2012). The *US Country Reports on Human Rights Practices for 2010* also indicates that, according to lesbian, gay, bisexual and transgender (LGBT) activists, "some employers fired LGBT persons who did not hide their orientations" (US 8 Apr. 2011, Sec. 6). *Country Reports 2010* further added that, in India, LGBT persons "faced physical attacks, rape and blackmail" (ibid.). Sangini noted that, based on its experience, LBT persons in both rural and urban areas face violence; the difference is that, in rural areas, the whole village becomes involved, while in urban areas it is usually the immediate family and neighbours (14 Apr. 2012).

Al Jazeera notes that "homosexuals have slowly gained a degree of acceptance in a few parts of India, especially in big cities" (5 July 2012). A *Wall Street Journal* (WSJ) article on its India Real Time blog indicates that Mumbai is "arguably the least hostile environment for the LGBT community in the country" (9 Mar. 2012). According to the article, Mumbai has an LGBT store, which is temporarily in Goa, as well as six local websites and media platforms, an

LGBT film festival, a pride week, and LGBT nights at popular bars and clubs (WSJ 9 Mar. 2012).

Al Jazeera reported in July 2011 that in the "last two years" New Delhi, Mumbai, Kolkata and other big cities have had large gay pride parades (5 July 2011). The *New York Times* indicates that during parades celebrating the second anniversary of the decriminalization of homosexuality by the Delhi High Court, participants "wore masks to conceal their identity" (5 July 2011).

## **1.1 Treatment of LGBT Activists**

*Country Reports 2010* indicates that, although LGBT groups were active throughout India, "they faced discrimination and violence in many areas of society, particularly in rural areas" (US 8 Apr. 2011, Sec. 6). Similarly, a UN report by the Special Rapporteur on the situation of human rights defenders, based on a mission to India from 10 to 21 of January in 2011, states that LGBT rights defenders in India "face discrimination, stigmatization and threats reportedly from many parts of society, especially in rural areas" (UN 6 Feb. 2012, para. 122). The UN report also notes that "[o]n some occasions, the police attacked LGBT activists for raising issues pertaining to the situation of the LGBT community" (ibid.). For example, an activist in West Bengal told the UN Special Rapporteur that "she has faced public harassment, emotional violence and beatings" (ibid.). In another incident mentioned in the report, an LGBT activist in Orissa was arrested in 2009 and detained for a day because of his advocacy work (ibid.). He said that he was "insulted" by police officers throughout the experience (ibid.).

## **2. Legislation**

### **2.1 Decriminalization of Homosexuality**

In 2009, the Delhi High Court decriminalized homosexuality (*The Economic Times* 24 Mar. 2012; *NY Times* 5 July 2011). The High Court struck down Section 377 of the *Indian Penal Code* (Al Jazeera 5 July 2011; *The Economic Times* 24 Mar. 2012), which criminalized "sexual acts against the order of nature" (Associate Professor 16 Apr. 2012), and punished same-gender sex with a maximum of 10 years in prison (Al Jazeera 5 July 2011).

The High Court said that Section 377 was "in violation of the Constitution" (WSJ 2 Mar. 2012). A report on laws affecting LGBT people in South Asia by the South Asia LGBT Network, which is made up of "LGBT-organisations working for the health and rights for lesbians, gays, bisexual or transgendered persons in India, Sri Lanka, Bangladesh, Nepal and Pakistan" (n.d.), states

[b]y virtue of the principle laid down by the Supreme Court that if a High Court found any statute to be in violation of the constitution, then the judgement became applicable across the whole of India, decriminalisation is effective and in force across India. (Feb. 2011, 47)

However, the Associate Professor noted that there are different positions across India on whether the High Court decision is relevant only to Delhi or to all of India (16 Apr. 2012). *Country Reports 2010* notes that Section 377 continues to apply to cases involving minors or coercion (US 8 Apr. 2011, Sec. 6).

### **2.2 Supreme Court Appeals Against Decriminalization**

The Indian *Economic Times* newspaper reports that, in March 2012, the Supreme Court heard appeals from groups who wanted to overturn the Delhi High Court's 2009 verdict, as well as from groups that were trying to defend it (24 Mar. 2012). According to the London-based *PinkPaper.com*, "the month-long trial has seen India's more socially conservative communities rally against the 2009 ruling" (27 Mar. 2012). Anti-gay rights activists, as well as social and religious organizations, reportedly filed more than 12 petitions to overturn the decision (*PinkPaper.com* 27 Mar. 2012). The WSJ's India Real Time blog also reports that petitions to reverse the High Court decision were filed by different groups and individuals, including a yoga guru, a Muslim group, and the Delhi Commission for Protection of Child Rights (23 Feb. 2012).

On 27 March 2012, the Supreme Court "reserved its verdict" on the appeal made against the Delhi High Court decision to decriminalize homosexuality, delaying their decision to a later date (*PinkPaper.com* 27 Mar. 2012). The Associate Professor noted that pending the decision of the Supreme Court, Section 377 is still in effect (16 Apr. 2012). According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an international NGO that focuses "public and government attention on cases of discrimination against LGBTI people by supporting programs and protest actions, asserting diplomatic pressure, providing information" and working with other international organizations and media (16 Dec. 2009), there is no legislation in India that "prohibits discrimination on the ground of sexual orientation" (ILGA n.d.).

## **2.3 Application of Section 377 of the Indian Penal Code**

Sources note that prosecutions under Section 377 of the *Indian Penal Code* did not happen often (Associate Professor 16 Apr. 2012; Al Jazeera 5 July 2011). One case mentioned by the Associate Professor was the arrest of LGBT activists in Lucknow in the early 2000s (16 Apr. 2012). The activists spent 40 days in jail, and they continue to have to report to the police because the charges remain in effect (Associate Professor 16 Apr. 2012).

Nevertheless, the Associate Professor noted that Section 377 is used "against sexual minorities," causing them to "suffer intimidation, rape and other violence" (16 Apr. 2012). For example, Section 377 has been used against LGBT people in India to "target" (Sout Asia LGBT Network Feb. 2011, 41; US 8 Apr. 2011, Sec. 6), "harass" (Al Jazeera 5 July 2011; US 8 Apr. 2011, Sec. 6), and "punish" them (ibid.). In a lecture on transgender rights delivered to civil judges on 12 February 2011, Supreme Court judge P. Sathasivam noted that Section 377 "has been extensively used by the law enforcers to harass and exploit homosexuals and transgender persons" (12 Feb. 2011, 3). Similarly, the Associate Professor noted that the police use the law to "blackmail" LGBT persons (16 Apr. 2012). An article on the decriminalization of homosexuality in India in the 2009 issue of *Reproductive Health Matters* by Geetanjali Misra, Executive Director of the women's human rights organization CREA (CREA n.d.), states that the police "often entrapped and blackmailed" homosexual males using Section 377 (Misra 2009, 21,22). The Supreme Court judge also said that homosexuals have faced "financial extortion by the police in exchange for not revealing their identities to society" (Sathasivam 12 Feb. 2011, 3).

## **3. Protection**

### **3.1 State Protection and Services**

Sangini stated that there are no government services or protection

specifically offered to sexual minorities (14 Apr. 2012). Similarly, the Associate Professor noted that the government does not offer protection to sexual minorities (16 Apr. 2012). Sangini said that it has not encountered "any LBT individual who has approached the police for protection from discrimination or violent attacks against them on their own" (14 Apr. 2012). The organization noted that of the LBT individuals known to it, all sought the protection of an NGO before going to the police (Sangini 14 Apr. 2012). Sangini also indicated that they are not aware of any investigations or legal actions taken by authorities for crimes committed against sexual minorities (14 Apr. 2012).

In 2011, Al Jazeera noted that India's Minister of Health "termed homosexuality as an unnatural 'disease' from the West at an HIV/AIDS conference" in New Delhi (5 July 2011). The *New York Times* also indicated that the health minister said that "[s]ex between two men is 'completely unnatural'" (5 July 2011), although, according to Al Jazeera, the Minister also said that he was "misquoted" (5 July 2011).

### **3.1.1 Treatment by Police**

Near the end of March 2012, media sources reported that, in New Delhi, police interrupted the opening night of a photography exhibition, whose theme was "homosexuality," after receiving a complaint about the content from an individual (*Hindustan Times* 27 Mar. 2012). The exhibition was closed down the following day by institutional sponsor Alliance Française (ibid.; *The Times of India* 29 Mar. 2012). A guest present at the exhibition informed the *Hindustan Times* that the police "stormed into the venue during the preview and started enquiring about the artist" (27 Mar. 2012). The photographer, a gay rights activist, noted that the police removed some of the photographs (*The Times of India* 29 Mar. 2012).

Sangini also indicated that

when LBT individuals decide to leave their parental home and live with their partner, there have been instances of forced repatriation to the parental home through police intervention, false cases have been put on people, so that the police can intervene. It is relatively easy for the parents/families to convince the police to support them in the search for their daughter. Then emotional blackmail is used to force the [individual] back to his/her parents, partners often face charges of abduction. (14 Apr. 2012)

The *Times of India* reported that, in February 2011, police from Mumbai and New Delhi tried to "barge" into an apartment, located in a Vasant Kunj neighbourhood in New Delhi, that was being rented by two lesbian women who were partners in order to arrest them (20 Feb. 2011). The couple had "fled to Delhi" from Mumbai because they had been "ostracized" (IANS 19 Feb. 2011). After protests from NGOs that intervened on behalf of the couple (IANS 19 Feb. 2011, *The Times of India* 20 Feb. 2011), the police officers, who refused to show identification, indicated that they would carry out the arrests in the morning the following day (ibid.). The Indo-Asian News Service (IANS) notes that the women were told to report to the police station the next morning (19 Feb. 2011). The parents of one of the women had charged her with robbing their house before she left Mumbai (*The Times of India* 20 Feb. 2011). The IANS notes that the women's parents charged both women with the same allegations (19 Feb. 2011). The same parents had also been using different "pressure tactics" to try and bring their daughter home, including reporting the two women to the National

Commission for Women (NCW), which "served a notice" on the couple (*The Times of India* 20 Feb. 2011). Both women appeared before the NCW to indicate that they did not want to return home and that they wanted to "live their life as adults" (ibid.). They also told the NCW that they did not want to return to Mumbai (IANS 19 Feb. 2011). The woman whose family was pressuring her to return alleged that "she was a victim of violence in her house and accused her brother of inflicting abuse" (*The Times of India* 20 Feb. 2011).

### **3.2 NGO Protection and Services**

According to the South Asia LGBT Network report, "India has a robust and effective LGBT activist movement, and largely supportive civil society and mass media that supports LGBT rights" (Feb. 2011, 41). The Associate Professor explained that the main purpose of LGBT NGOs in India is to provide a "social space" where sexual minorities can meet and organize, as well as education on health and sexual minorities (16 Apr. 2012). She added that NGOs can also respond to cases in which LGBT persons have been arrested or affected by the law; however, they cannot provide assistance in cases of LGBT discrimination affecting employment or housing (Associate Professor 16 Apr. 2012). The Associate Professor also noted that NGOs are not able to provide protection for LGBT members on an "ongoing basis" (ibid.). However, she did mention that in New Delhi, the Sangini (India) Trust provides a shelter and support for lesbians (ibid.). For example, because parents of lesbian daughters may use the police to bring their daughters home, the organization assists women in signing affidavits to demonstrate that they have left their home willingly (ibid.).

## **4. Transgender Persons**

In his lecture, the Supreme Court judge noted that the

main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities such as HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy and problems related to marriage and adoption. (Sathasivam 12 Feb. 2011, 2)

The transgender community also has problems inheriting property and adopting children; many end up begging and dancing or becoming sex workers "for survival" (ibid.).

According to the South Asia LGBT Network report, transgender persons in India have "some positive discrimination in their favor and there are some executive orders that protect their rights and interests" (Feb. 2011, 48). For example, since 2005 they have been able to identify themselves as "'others'" on passport application forms (South Asia LGBT Feb. 2011, 48). In addition, in 2009, the national electoral law changed, allowing transgender persons to register as a third sex (ibid., 49). According to the Supreme Court judge, transsexuals in India have been listed as "'others'" on electoral rolls and voter identity cards since 2009 (Sathasivam 2 Feb. 2011, 5). The Indian government is reported to have announced that the 2011 national census will have the option "other" for transgender persons (US 8 Apr. 2011, Sec. 6).

However, except for those issued in the state of Tamil Nadu, application forms for other types of identity documents such as driver's licences or ration

cards do not recognize the third-gender identity (South Asia LGBT Feb. 2011, 49). Country Reports 2010 also noted that the state of Tamil Nadu issues separate identity and ration cards to transgender individuals (US 8 Apr. 2011, Sec. 6).

The Supreme Court judge notes that Tamil Nadu has

taken affirmative action to achieve equality [for transgender persons] by reserving seats for third-gender students in government-owned art and science colleges and providing ration cards (identity documents) to third-gender people with the appropriate gender category. The state government was also giving subsidy to all those transgenders who wish to undergo surgical treatment for change of their sex. (Sathasivam 2 Feb. 2011, 4)

*Country Reports 2010* notes that, for a week in April 2010, the state of Tamil Nadu held a transgender festival to "facilitate the acceptance of transgender persons into mainstream society" (US 8 Apr. 2011, Sec. 6).

On 12 November 2010, the Karnataka government announced that the "Backward Classes" list will include transgender persons, allowing them access to pensions, ration cards, and housing assistance (ibid.).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

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## **Additional Sources Consulted**

**Oral sources:** The International Gay and Lesbian Human Rights Commission was unable to provide information for this Response. Attempts to contact representatives of the following organizations were unsuccessful: Arawanis Social Welfare Society, Gay Bombay, Human Rights Law Network, Humsafar Trust, India Centre for Human Rights and Law, Naz Foundation (India) Trust, Transpal Foundation, and VICALP (Women's Group).

**Internet sites, including:** Amnesty International; Asia Society; *Asia Times Online*; Asian Centre for Human Rights; Australia Refugee Review Tribunal; Bikya Masr; ecoi.net; India Network for Sexual Minorities; Indo-Asian News Service; International Gay and Lesbian Human Rights Commission; National Human Rights Commission; Queerty.com; United Kingdom Border Agency; United Nations — Integrated Regional Information Networks, Office of the High Commissioner for Human Rights, Refworld; *Washington Post*.

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